

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 * * *

4 FRANK J. FOSBRE, JR., individually and
5 on behalf of all others similarly situated,

6 Plaintiff,

7 v.

8 LAS VEGAS SANDS CORPORATION,
9 SHELDON G. ADELSON, and WILLIAM P.
WEIDNER,

10 Defendants.

Case No. 2:10-CV-00765-APG-GWF

**ORDER (1) GRANTING MOTION TO
EXPAND CLASS PERIOD AND (2)
DENYING MOTION FOR HEARING**

(Dkt. #134, Dkt. #155)

11
12 The court set forth the pertinent facts of this class action in a prior order and I will not
13 repeat them here except where necessary. (Dkt. #55.) In brief, defendant Las Vegas Sands
14 Corporation (“LVS”) operates resorts and gaming properties in Las Vegas, Macao, and
15 Singapore. Plaintiffs contend they purchased LVS stock at artificially high prices between
16 August 2, 2007 and November 5, 2008 because during that period LVS made false and
17 misleading public statements about its development plans, liquidity, and equity offerings.

18 Plaintiffs bring claims under section 10(b) of the Securities Exchange Act of 1934 and
19 Rule 10b-5 against defendants LVS, Sheldon Adelson, and William Weidner, and under section
20 20(a) of the Act against Adelson and Weidner for “control person” liability. The plaintiffs
21 previously moved to certify a class with a class period running from August 2, 2007 through
22 November 5, 2008.¹ (Dkt. #77.) The defendants did not oppose certification except on two
23 limited grounds. (Dkt. #84.) First, the defendants argued the class definition should clarify that
24 only those who were damaged by the defendants’ alleged conduct should be included in the class
25 definition. The plaintiffs agreed and the court adopted that formulation. Second, the defendants
26

27
28 ¹ This date sometimes inadvertently has been stated as November 6, 2008. As the plaintiffs have
clarified, however, the date should be November 5, 2008. (Dkt. #148 at 1 n.1.)

1 argued that the class period should be limited to those who purchased stock from February 4,
2 2008 through November 6, 2008 (the “Later Class Period”) because there were no actionable
3 alleged misrepresentations prior to that beginning date. The defendants argued that class
4 certification therefore should be denied for the period running from August 2, 2007 through
5 February 3, 2008 (the “Earlier Class Period”). This argument was related to the defendants’
6 motion to dismiss and motion for reconsideration. Defendants otherwise did not oppose, at that
7 time, certifying a class for the Later Class Period. (*Id.* at 2 n.1.)

8 The court partially granted the defendants’ motion and certified a class for the period
9 running from February 4, 2008 through November 6, 2008. (Dkt. #55, #86.)² The court held that
10 claims related to the Later Class Period were sufficiently pleaded but that the plaintiffs had not
11 pleaded scienter with sufficient particularity for the Earlier Class Period. (Dkt. #86.) The court
12 therefore dismissed the insufficiently pleaded claims with leave to amend. (*Id.*) The court also
13 indicated that it would entertain a motion to expand the class period to include the Earlier Class
14 Period if the plaintiffs amended the pleadings with sufficient particularity. (*Id.*)

15 The plaintiffs filed a Second Amended Complaint (Dkt. #87), which I held sufficiently
16 pleaded claims related to the Earlier Class Period, meaning the first date of actionable alleged
17 misconduct is August 2, 2007. (Dkt. #118.) I indicated that based on this ruling, I would entertain
18 a motion to expand the class definition to cover the Earlier Class Period. (*Id.*)

19 The plaintiffs moved to expand the class period in January 2014. (Dkt. #123.) The parties
20 subsequently requested I defer consideration of the issue pending the United States Supreme
21 Court’s decision in *Halliburton Co. v. Erica P. John Fund, Inc.* (Dkt. #129.) The Supreme Court
22

23 ² The court defined the class as follows:

24 All persons or entities who purchased or otherwise acquired the common stock of Las
25 Vegas Sands Corp. (“LVS” or the “Company”) from February 4, 2008 through November
26 6, 2008, inclusive (the “Class Period”) who were damaged by the Defendant’s alleged
27 misconduct. Excluded from the Class are defendants, the officers and directors of the
28 Company at all relevant times, members of defendants’ immediate families and their legal
representatives, heirs, successors or assigns and any entity in which defendants have or
had a controlling interest.

(Dkt. #86 at 21.)

1 issued that decision on June 23, 2014. The plaintiffs now move for expansion of the certified
 2 class to include the Earlier Class Period. The defendants oppose and request that I not only deny
 3 expansion of the class, but also that I decertify the class with respect to the Later Class Period.

4 The parties agree I may alter or amend the certification order under Federal Rule of Civil
 5 Procedure 23(c)(1)(C). The only remaining issue between the parties on class certification is
 6 whether common issues predominate under Rule 23(b)(3). Specifically, the parties dispute
 7 whether the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)
 8 requires that to establish predominance, a plaintiff seeking to certify a class must show that
 9 damages can be calculated on a class-wide basis and in a manner consistent with the theory of
 10 liability. Because *Comcast* and other relevant authority do not require a method to determine
 11 damages on a class-wide basis as a prerequisite to predominance, and because common issues
 12 predominate in this case, I grant the plaintiffs' motion to expand the class period to encompass
 13 the Earlier Class Period.

14 **I. CERTIFYING A CLASS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23**

15 A court may certify a class under Federal Rule of Civil Procedure 23 only if:

16 (1) the class is so numerous that joinder of all members is impracticable; (2) there
 17 are questions of law or fact common to the class; (3) the claims or defenses of the
 representative parties are typical of the claims or defenses of the class; and (4) the
 representative parties will fairly and adequately protect the interests of the class.

18 Fed. R. Civ. P. 23(a). In addition to these requirements, the plaintiff also must satisfy at least one
 19 of the three conditions in Rule 23(b). At issue here is Rule 23(b)(3), which requires the party
 20 seeking certification to show that "questions of law or fact common to class members
 21 predominate over any questions affecting only individual members, and that a class action is
 22 superior to other available methods for fairly and efficiently adjudicating the controversy."

23 Rule 23 is not "a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.
 24 2541, 2551 (2011); *Comcast*, 133 S. Ct. at 1432. Rather, the court must perform "a rigorous
 25 analysis" to ensure Rule 23's requirements have been satisfied. *Dukes*, 131 S. Ct. at 2551. That
 26 analysis may "overlap with the merits of the plaintiff's underlying claim." *Id.* However, the court
 27 should consider merits questions only to the extent that they are relevant to determining whether
 28

1 the plaintiffs have satisfied Rule 23's requirements. *Amgen Inc. v. Conn. Ret. Plans & Trust*
 2 *Funds*, 133 S. Ct. 1184, 1194-95 (2013). The inquiry is not whether the class will prevail on the
 3 merits of their claims but whether common questions capable of class-wide resolution exist and
 4 whether those common questions predominate over individualized ones. *Id.* at 1196.

5 A. *Comcast*

6 The parties dispute the meaning of the Supreme Court's decision in *Comcast*. Defendants
 7 contend *Comcast* requires the plaintiffs to identify a method of calculating damages on a class-
 8 wide basis and in a manner that fits with the plaintiffs' theory of liability in the case. Plaintiffs
 9 respond that *Comcast* does not require a class-wide method of calculating damages in every case
 10 and, even if it does, they have presented evidence that such a method exists in this case.

11 *Comcast* does not require that every plaintiff seeking to certify a class must present a
 12 method of calculating damages on a class-wide basis. In *Comcast*, the parties did not dispute that
 13 to satisfy the predominance requirement in that particular case, the plaintiffs had to demonstrate
 14 an antitrust injury that was "capable of proof at trial through evidence that [was] common to the
 15 class rather than individual to its members; and (2) that the damages resulting from that injury
 16 were measurable on a class-wide basis through use of a common methodology." 133 S. Ct. at
 17 1430 (quotations omitted). Consequently, "*Comcast* held that a model for determining classwide
 18 damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that
 19 result from the class's asserted theory of injury." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407
 20 (2d Cir. 2015). But *Comcast* "did not hold that proponents of class certification must rely upon a
 21 classwide damages model to demonstrate predominance." *Id.* Nor did it hold that a class cannot
 22 be certified under Rule 23(b)(3) where damages cannot be measured on a class-wide basis. *Id.*

23 Following *Comcast*, the Ninth Circuit reiterated the long-standing rule³ that individualized
 24 "damage calculations alone cannot defeat certification." *Leyva v. Medline Indus. Inc.*, 716 F.3d

25
 26 ³ See *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably
 27 an individual question and does not defeat class action treatment."); see also Advisory Committee's 1966
 28 Notes on Fed. R. Civ. P. 23 ("[A] fraud perpetrated on numerous persons by the use of similar
 misrepresentations may be an appealing situation for a class action, and it may remain so despite the need,
 if liability is found, for separate determination of the damages suffered by individuals within the class.").

1 510, 513 (9th Cir. 2013) (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094
 2 (9th Cir. 2010)); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167-68 (9th Cir. 2014).

3 Other circuit courts agree that *Comcast* does not categorically require a class-wide method of
 4 calculating damages as a prerequisite to certification.⁴

5 Moreover, a month before the Supreme Court issued *Comcast*, it stated in *Amgen* that
 6 Rule 23(b)(3) “does not require a plaintiff seeking class certification to prove that each “elemen[t]
 7 of [her] claim [is] susceptible to classwide proof.” 133 S. Ct. at 1196 (emphasis omitted); *see also*
 8 *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis omitted) (stating
 9 that not “every question of law or fact must be common to the class”). Instead, the rule requires
 10 “that common questions ‘predominate over any questions affecting only individual [class]
 11 members.’” *Amgen*, 133 S. Ct. at 1196 (quoting Fed. R. Civ. P. 23(b)(3)). Just two years prior to
 12 *Comcast*, the Supreme Court stated in *Dukes* that it was “clear that individualized monetary
 13 claims belong in Rule 23(b)(3).” 131 S. Ct. at 2558. This statement would make no sense if a
 14 class-wide method for determining damages was required in every case under Rule 23(b)(3). *See*
 15 *id.* at 2558-59 (stating that Rule 23(b)(3) requires a superiority and predominance inquiry
 16 because, unlike classes under Rule 23(b)(2), superiority and predominance are not “self-evident”
 17 under Rule 23(b)(3) where each class member has an “individualized claim for money”).
 18 *Comcast* itself stated that it involved only “a straightforward application of class-certification
 19 principles.” 133 S. Ct. at 1433. *Comcast* thus is not the sea change that defendants suggest. In
 20 sum, although I should consider whether damages may have to be ascertained on an individual
 21 basis in deciding whether common issues predominate, the failure to set forth a common method
 22 of determining damages does not defeat class certification in all cases. *Roach*, 778 F.3d at 408.

23 / / / /

24
 25 ⁴ *See Roach*, 778 F.3d at 407; *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014) (“But nothing
 26 in *Comcast* mandates a formula for classwide measurement of damages in all cases.”); *In re Urethane*
 27 *Antitrust Litig.*, 768 F.3d 1245, 1257-58 (10th Cir. 2014); *In re Whirlpool Corp. Front-Loading Washer*
 28 *Prod. Liability Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013) (stating that post-*Comcast* “it remains the
 black letter rule that a class may obtain certification under Rule 23(b)(3) when liability questions common
 to the class predominate over damages questions unique to class members” (quotation omitted)); *Butler v.*
Sears, Roebuck & Co., 727 F.3d 796, 800-02 (7th Cir. 2013).

1 **B. Common Issues Predominate**

2 To determine predominance, I begin with the elements of the underlying causes of action.
3 *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (*Halliburton I*). The
4 plaintiffs in this action bring two claims: (1) securities fraud under § 10(b) and Rule 10b-5 and (2)
5 control person liability under § 20(a). The elements of a private securities fraud claim based on
6 violations of § 10(b) and Rule 10b-5 are: “(1) a material misrepresentation or omission by the
7 defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the
8 purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic
9 loss; and (6) loss causation.” *Id.* (quotation omitted). To establish control person liability under
10 § 20(a), “a plaintiff must prove: (1) a primary violation of federal securities law and (2) that the
11 defendant exercised actual power or control over the primary violator.” *No. 84 Employer-*
12 *Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 945 (9th
13 Cir. 2003) (quotations omitted).

14 Even assuming there will be individualized damages calculations, common questions on
15 both claims predominate over individualized ones. As to the securities fraud claims, “[w]hether
16 common questions of law or fact predominate in a securities fraud action often turns on the
17 element of reliance.” *Halliburton I*, 131 S. Ct. at 2184. Plaintiffs in a securities fraud lawsuit may
18 seek to show reliance on a class-wide basis through the fraud-on-the-market theory first
19 recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and recently reaffirmed in *Halliburton*
20 *Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405 (2014) (*Halliburton II*). Under this theory,
21 plaintiffs can satisfy the reliance element of a securities fraud claim on a class-wide basis by
22 invoking a rebuttable “presumption that the price of stock traded in an efficient market reflects all
23 public, material information—including material misstatements,” and therefore “anyone who
24 buys or sells the stock at the market price may be considered to have relied on those
25 misstatements.” *Halliburton II*, 134 S. Ct. at 2405. Without this presumption of reliance,
26 plaintiffs cannot pursue a § 10(b) or Rule 10b-5 lawsuit as a class action because “[e]ach plaintiff
27
28

1 would have to prove reliance individually, so common issues would not ‘predominate’ over
2 individual ones, as required by Rule 23(b)(3).” *Id.* at 2416.

3 To invoke this presumption of reliance, a plaintiff must show:

4 (1) that the alleged misrepresentations were publicly known, (2) that they were
5 material, (3) that the stock traded in an efficient market, and (4) that the plaintiff
6 traded the stock between the time the misrepresentations were made and when the
truth was revealed.

7 *Id.* at 2408. If the plaintiff makes this showing, the defendant may attempt to defeat class
8 certification by showing “the alleged misrepresentation did not, for whatever reason, actually
9 affect the market price, or that a plaintiff would have bought or sold the stock even had he been
10 aware that the stock’s price was tainted by fraud.” *Id.*

11 Here, the defendants have never disputed that the plaintiffs are entitled to the *Basic*
12 presumption, at least at this stage of the proceedings. The plaintiffs argued and presented
13 evidence on the fraud-on-the market theory in their original motion to certify (Dkt. #77, #78) and
14 in their motion to expand the class period (Dkt. #134). The plaintiffs identified the alleged
15 misrepresentations which were publicly known given their means of dissemination, including
16 LVS’s public filings with the Securities and Exchange Commission and comments made on calls
17 with market analysts. (*See* Dkt. #28; Dkt. #134-1.) The plaintiffs need not present proof that the
18 alleged misrepresentations were material at the class certification stage because “materiality is
19 judged according to an objective standard,” and the materiality of the alleged misrepresentations
20 therefore “is a question common to all members of the class.” *Amgen*, 133 S. Ct. at 1191. The
21 plaintiffs’ expert opines that LVS stock traded in an efficient market. (Dkt. #134-1.) Finally, the
22 plaintiffs present evidence they purchased LVS shares during the relevant time period. (Dkt. #78-
23 4 at 3; Dkt. #78-5 at 2.) The plaintiffs thus have invoked the *Basic* presumption that reliance can
24 be determined on a class-wide basis under the fraud-on-the-market theory. The defendants have
25 not argued that the plaintiffs have not invoked the presumption, nor have the defendants
26 attempted to rebut it. The plaintiffs thus have shown reliance is a common question to the class
27 under the fraud-on-the market theory.
28

1 Other elements of the plaintiffs' securities fraud claim also raise questions common to the
2 class. Whether the defendants made misrepresentations is a question common to the class, as is
3 whether those misrepresentations were material. *See Amgen*, 133 S. Ct. at 1195-96 (stating that
4 "materiality is a common question for purposes of Rule 23(b)(3)" (quotation omitted)). Likewise,
5 whether defendants acted with scienter is a common question based on the defendants' state of
6 mind, not on any individualized inquiry involving class members.

7 The plaintiffs' claims under § 20(a) also involve common questions. Whether Adelson or
8 Weidner exercised actual power or control over LVS are questions common to the class and will
9 require no individualized inquiries with respect to the class members.

10 Thus, even assuming damages will have to be determined on an individualized basis,⁵
11 common questions of whether the defendants made the alleged misrepresentations, whether they
12 did so with scienter, whether those alleged misrepresentations were material, whether the class
13 relied on the alleged misrepresentations, and whether Adelson or Weidner are control persons are
14 common questions which predominate over individualized damages inquiries. It is preferable to
15 determine these common questions once, rather than a multitude of times (or not at all if the small
16 value of individual recoveries would deter any single plaintiff from bringing suit). (Dkt. #78-7 &
17 Dkt. #134-1 at 15 (showing millions of LVS shares sold during the relevant time-frame); *Butler v.*
18 *Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

19 Because there is no dispute that the plaintiffs have satisfied Rule 23(a) and because I find
20 the plaintiffs have also satisfied Rule 23(b)(3), I grant the plaintiffs' motion to expand the class
21 period to include both the Earlier Class Period and the Later Class Period. The class is defined as
22 follows:

23 All persons or entities who purchased or otherwise acquired the common stock of
24 Las Vegas Sands Corp. ("LVS" or the "Company") from August 2, 2007 through
25 November 5, 2008, inclusive (the "Class Period") who were damaged by the
26 Defendants' alleged misconduct. Excluded from the Class are defendants, the

26 ⁵ The parties dispute whether the plaintiffs can construct a methodology capable of assessing
27 damages on a class-wide basis. I need not resolve that issue now. It suffices to certify the class on the
28 predominant common questions even assuming defendants are correct that damages inquiries will have to
be conducted on an individualized basis.

1 officers and directors of the Company at all relevant times, members of
2 defendants' immediate families and their legal representatives, heirs, successors or
3 assigns and any entity in which defendants have or had a controlling interest.

4 **II. CONCLUSION**

5 IT IS THEREFORE ORDERED that the plaintiffs' motion to expand the class period
6 **(Dkt. #134) is GRANTED.**

7 IT IS FURTHER ORDERED that the defendants' request for oral argument **(Dkt. #155)**
8 **is DENIED.**

9 DATED this 15th day of June, 2015.

10 
11 _____
12 ANDREW P. GORDON
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28